BUMI ARMADA NAVIGATION SDN BHD v. MIRZA MARINE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-23-01-2015]
20 MAY 2015

ARBITRATION: *Reference of dispute – Interim relief – Whether court may grant interim relief pending disposal of arbitration – Whether court may give interim injunction before commencement of arbitral proceedings – Elements to be proven for interim relief – Arbitration Act 2005, s. 11(1)*

ARBITRATION: *Reference of dispute – Interlocutory injunction – Application for Mareva injunction pending conclusion of arbitral proceedings – Whether court may grant Mareva injunction before or during arbitral proceedings – Elements to be proven – Conditions that may be imposed on Mareva injunction – Arbitration Act 2005, s. 11(1)(f), (g) & (h)*

CIVIL PROCEDURE: *Costs – No order as to costs – Punishment for delay – Failure to send arbitration notice as soon as possible after obtaining ex parte Mareva injunction – No order made as to costs – Rules of Court 2012, O. 59 r. 8(b)*

CIVIL PROCEDURE: *Injunctions – Mareva injunction – Application for Mareva injunction pending conclusion of arbitral proceedings – Whether court may grant Mareva injunction before or during arbitral proceedings – Elements to be proven – Conditions that may be imposed on Mareva injunction – Arbitration Act 2005, s. 11(1)(f), (g) & (h)*

The plaintiff owned a vessel called 'MV Armada Firman 2' ('the vessel'). On 26 June 2014, the plaintiff entered into a charter party agreement ('the contract') with the defendant in respect of the vessel. The contract was in the format of 'Baltic and International Maritime Council's' (BIMCO) 'Time Charter Party For Offshore Service Vessels, Supplytime 2005'. The vessel was required to be delivered by the plaintiff to the defendant in 'Labuan Anchorage' on 7 July 2014. The contract contained an arbitration clause. The charter rate was to be paid by the defendant to the plaintiff in four instalments on the following dates: (i) the first instalment of RM2,940,000 ('the first instalment') to be paid 30 days in advance and prior to the vessel's departure from Singapore; and (ii) the second, third and fourth instalments, each amounting to RM2,940,000, to be paid on 22 August 2014, 22 September 2014 and 22 October 2014 respectively. The defendant was also to pay the plaintiff 'mobilisation fees' and 'demobilisation fees'. Clause 13(b) provided that the owner's liability for any loss, damage or delay sustained by the charterers as a result of the vessel being prevented from working by any cause whatsoever was limited to suspension of hire. The

vessel sailed from Singapore on 4 July 2014 to 'Labuan Anchorage'. The defendant, however, only paid the first instalment on 14 July 2014. The plaintiff then issued to the defendant an invoice for the second instalment which was payable on 22 August 2014. The defendant subsequently raised the following allegations regarding the vessel: (i) that the vessel's 'Dynamic Positioning System' had failed and hence, the vessel was not fit to be used for its main purpose; (ii) that there were major mechanical and software defects on the vessel; and (iii) that there was a breakdown of the equipment on the vessel as well as a breakdown of the vessel. The defendant then purported to exercise its rights to terminate the contract. The plaintiff accepted the defendant's early termination of the contract and demanded the defendant pay a total of RM3,635,300 consisting of charter hire for 54.837 days, mobilisation fee and demobilisation fee. The defendant in turn claimed for losses said to be suffered due to the plaintiff's breach. The plaintiff filed the present suit seeking for a *Mareva* injunction against the defendant's assets pending conclusion of arbitral proceedings between the parties. The plaintiff also sought for an order that the defendant disclose to the plaintiff the full value of assets owned by the defendant, with full particulars regarding the nature, quantity and location of those assets.

Held (allowing application):

(1) Section 11(1) of the Arbitration Act 2005 ('AA') enables a party to apply to court 'before' the commencement of arbitral proceedings. As such, the court may grant interim relief under s. 11(1) AA before the commencement of arbitral proceedings. (para 39)

(2) Section 11(1) AA expressly allows judicial 'intervention' in a very limited form – the court may grant interim (and not permanent) relief pending the disposal of arbitration. An applicant for interim relief under s. 11(1) AA before the commencement of any arbitral proceedings, should satisfy the court of the five following matters: (a) the applicant must have a cause of action against the party whom interim relief is sought; (b) there must be an 'arbitration agreement' as understood in ss. 2(1) and 9(1) to (5) AA; (c) the relief sought must be interim in nature and cannot be permanent in effect; (d) the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings; (e) arbitral proceedings should be commenced within a reasonable time. If the five matters are fulfilled by an applicant, in deciding an application for interim relief under s. 11(1) AA, the court should not decide on the merits of the dispute which should be decided solely by the arbitral tribunal. Despite the court not making a final pronouncement on the merits of the dispute in deciding whether to grant interim relief or not under s. 11(1) AA, the court may nevertheless have to assess the strength of the parties' case in deciding certain applications for interim relief, such as *Mareva* injunction applications. (paras 46, 47, 49 & 51)

(3) The court may grant a *Mareva* injunction before or during arbitral proceedings under s. 11(1)(f) AA. In deciding whether to grant a *Mareva* injunction under s. 11(1)(f), (g) and (h) AA before or after during arbitral proceedings, the following tests are to be applied: (a) the plaintiff should have a 'good arguable case'; (b) the defendant has assets within the jurisdiction; (c) there is a risk of dissipation of the defendant's assets; and (d) the balance of convenience should be in favour of granting the *Mareva* injunction. Paragraphs (c), (g) and (h) of s. 11(1) AA empower the court to give mandatory disclosure orders. (paras 56, 58 & 61)

(4) The defendant had assets within the jurisdiction. The plaintiff had a valid cause of action against the defendant for breach of the contract. The plaintiff had a 'good arguable case' in respect of the defendant's breach. With regards the risk of dissipation of assets, the evidence showed lack of honesty on the part of the defendant. The balance of convenience lay in favour of a *Mareva* injunction. A *Mareva* injunction must contain the sum for which the plaintiff claims to have a 'good arguable case'. The first prayer had clearly specified the monetary limit for the *Mareva* injunction. (paras 68, 72, 73 & 74)

(5) When the court grants a *Mareva* injunction, the court should ensure that the *Mareva* injunction is not abused so as to oppress the defendant. As such, the court in giving a *Mareva* injunction, should consider allowing the defendant to use its frozen assets for any one or more of the following three purposes: (a) if the defendant is an individual, the defendant may apply for access to his or her frozen assets to pay reasonable and ordinary living expenses; (b) the court should allow a party subject to a *Mareva* injunction, to use the frozen assets for the party's reasonable and ordinary operational expense if the party has no other assets except for the frozen assets; and (c) the court should also make provision in a *Mareva* injunction for the defendant to utilise the frozen funds to pay for his or her legal advice and representation in the suit and arbitration in question. (para 81)

(6) The court awarded RM30,000 a week for the defendant to use as reasonable and ordinary operational expense because the defendant was in the 'Oil and Gas' industry which requires a huge operating budget. A sum of RM80,000 for the defendant's legal costs was reasonable and not excessive. (paras 83 & 85)

(7) After obtaining the *ex parte Mareva* injunction, the plaintiff should have sent the arbitration notice as soon as reasonably possible. The plaintiff's delay in doing so was relevant to the question of costs under O. 59 r. 8(b) of the Rules of Court 2012 ('RC'). In view of the plaintiff's delay, the court exercised its discretion under O. 59 r. 8(b) RC and made no order as to costs. (paras 86 & 88)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Ang Chee Huat v. Thomas Joseph Engelbach [1995] 2 CLJ 893 CA ***(refd)***

Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 2 CLJ Supp 169 HC ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

AT & T Istel Ltd & Anor v. Tully & Ors [1992] 3 All ER 523 ***(refd)***

Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA ***(refd)***

Cantor Index Ltd v. Lister [2002] CP Rep 25 ***(refd)***

Capping Corporation Limited & Ors v. Aquawalk Sdn Bhd & Ors [2013] 1 LNS 574 CA ***(refd)***

Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] AC 334 ***(refd)***

Chin Wai Hong & Anor v. Lim Guan Hoe & Anor [2014] 1 LNS 1438 ***(refd)***

Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd [2010] 1 LNS 1834 HC ***(refd)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***

Dawama Sdn Bhd v. Mohd Fadel Yusof & Ors [2014] 1 LNS 803 HC ***(refd)***

Halifax Plc v. Chandler [2001] EWCA Civ 1750 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***

I-Expo Sdn Bhd v. TNB Engineering Corporation Sdn Bhd [2007] 1 LNS 304 HC ***(refd)***

Ikatan Innovasi Sdn Bhd v. KACC Construction Sdn Bhd [2008] 3 CLJ 48 HC ***(refd)***

Itramas Technology Sdn Bhd v. AmBank (M) Berhad & Anor [2009] 1 LNS 923 HC ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd [1999] 4 CLJ 30 HC ***(refd)***

Jayapadu Oil & Gas Sdn Bhd v. Chersonese Oil Sdn Bhd [2014] 1 LNS 972 HC ***(refd)***

Karuppannan Chellapan v. Balakrishnen Subban [1994] 4 CLJ 479 FC ***(refd)***

Khoo Soo Teong v. Khoo Siew Ghim & Anor [1991] 3 CLJ 2063; [1991] 1 CLJ (Rep) 212 SC ***(refd)***

Lien Hoe Sawmill Co Sdn Bhd v. Yap Sing Hock & Ors [1992] 2 CLJ 1022; [1992] 2 CLJ (Rep) 727 HC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

PCW (Underwriting Agencies) Ltd v. Dixon & Anor [1983] 2 All ER 158 ***(refd)***

Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor [2014] 1 CLJ 18 FC ***(refd)***

Mareva Compania Naviera SA v. International Bulkcarriers SA [1980] 1 All ER 213 ***(refd)***

Metrod (Singapore) Pte Ltd v. GEP II Beteiligungs Gmbh & Anor [2013] 1 LNS 324 HC ***(refd)***

Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd [1996] 3 CLJ 483 CA ***(refd)***

S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***

Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 CA ***(refd)***

Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd [1997] 1 CLJ 596 CA ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

Tinta Press Sdn Bhd v. Bank Islam (M) Bhd [1987] 1 CLJ 447; [1987] CLJ (Rep) 396 SC ***(refd)***

Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 CA ***(refd)***

Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 CA ***(refd)***

Z Ltd v. A & Ors [1982] 1 All ER 556 ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 44(1), (3)(b)(iii), (3)(b)(v)

Arbitration Act 2005, ss. 2(1), (2)(a), 8, 9(1), (2), (3), (4), (5), 11(1)(e), (f), (g), (h), (3) 13(6), 19(1)(d), 23, 50, 51(1)

Arbitration Act 1952, s. 13(6)

Civil Procedure Rules 1998, r. 25.1(1)(f)

Companies Act 1965, s. 176

Courts of Judicature Act 1964, s. 67(1)

Rules of Court 2012, O. 28 r. 3C, O. 29 r. 1(2), O. 29 r. 1(2B), O. 59 r. 8(b), O. 69

Arbitration Act 1996 [UK], s. 44(3), (4), (5), (7)

For the plaintiff - Lavinia Kumaraendran (Mavinthra Jothy (pupil) with her); M/s Thomas Philip

For the defendant - Hanif Idris (Fadzil Manan & Shahir Razak with him); M/s Shahir Razak & Assocs

Reported by Amutha Suppayah

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This case discusses the court's power to grant:

(a) a *Mareva* injunction before the commencement of arbitral proceedings under s. 11(1) of the Arbitration Act 2005 (AA). If a *Mareva* injunction is granted, this judgment will discuss whether the court has the power to provide that a party whose assets have been frozen by a *Mareva* injunction, be allowed to use part of the party's frozen assets to pay for the party's:

(i) reasonable and ordinary operational expense; and

(ii) legal advice and representation for the suit in question and potential arbitration; and

(b) a mandatory order under s. 11(1) AA to compel a party subject to a *Mareva* injunction, to affirm an affidavit to disclose all information regarding the party's assets (mandatory disclosure order).

Facts

[2] The plaintiff company (plaintiff) owns a vessel called "MV Armada Firman 2" (vessel).

[3] On 26 June 2014, the plaintiff has entered into a charter party agreement (contract) with the defendant company (defendant) in respect of the vessel.

[4] The contract is in the format of "Baltic and International Maritime Council's" (BIMCO) "Time Charter Party For Offshore Service Vessels, Supplytime 2005". BIMCO is the world's largest international association of ship owners. Part 1 of the contract (part 1) is in the format of boxes whereby both the plaintiff and defendant have agreed in those boxes in Part 1, either to refer or not, to detailed clauses in part 2 of the contract (part 2).

[5] The contract provides for, among others:

(a) the defendant has agreed to hire the vessel from the plaintiff for a period of four months (Box 9 (part 1) and cl. 1(a) (part 2)) at a charter hire rate of RM98,000 per day (Box 20 (part 1) and cl. 12(a) (part 2));

(b) the vessel is required to be delivered by the plaintiff to the defendant in "Labuan Anchorage" on 7 July 2014 (Box 5 (part 1) and cl. 2(c) (part 2)). If the vessel is not delivered by midnight, 14 July 2014, the defendant is entitled to cancel the contract (Box 6 (part 1) and cl. 2(c) (part 2));

(c) "any dispute arising out of or in connection with" the contract "shall be referred to arbitration" (Box 34 (part 1) and cl. 34(c) (part 2)) (arbitration clause);

(d) Part 1 states that the contract "shall be performed" subject to, among others, "Annexure A" (Annexure A). Annexure A provides for the daily charter rate to be paid by the defendant to the plaintiff in four instalments on the following dates:

(i) the first instalment of RM2,940,000 (first instalment) to be paid by the defendant to the plaintiff 30 days in advance and prior to the vessel's departure from Singapore; and

(ii) the second, third and fourth instalments (second, third and fourth instalments), each amounting to RM2,940,000, to be paid by the defendant to the plaintiff on 22 August 2014, 22 September 2014 and 22 October 2014 respectively.

Annexure A provides for the defendant to pay the plaintiff "mobilization fees" and "demobilization fees". Box 23 (part 1) and cl. 12(a)(part 2) provide for payments to be made by the defendant to the plaintiff "As per owner's (plaintiff) invoice instructions".

Part 1 provides, among others, that if there is any conflict between part 1 and Annexure A, part 1 "shall prevail" "to the extent of such conflict but no further"; and

(e) clause 13(b) (part 2) (cl. 13(b)) provides as follows:

> (b) Liability for Vessel not Working – *The Owner's liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any cause whatsoever shall be limited to suspension of hire*, except as provided in Clause 11(a)(iii).
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> (emphasis added).

Clause 11(a)(iii) (part 2) does not apply in this case. A

[6] After hiring the vessel from the plaintiff, the defendant hired the vessel to Time Marine Services Sdn Bhd (TMS). TMS then hired the vessel to Petra Resources Sdn Bhd (PRSB). In turn, PRSB hired the vessel to Petronas Carigali Sdn Bhd (PCSB). B

[7] The vessel has been delivered by the plaintiff to the defendant after the vessel has undergone successful "checks and trials". I will discuss these "checks and trials" later in this judgment.

[8] The vessel sailed from Singapore on 4 July 2014 to "Labuan Anchorage". Based on Annexure A, the defendant should have paid the first C instalment 30 days in advance and prior to the vessel's departure from Singapore on 4 July 2014. The first instalment was however only paid by the defendant to the plaintiff on 14 July 2014.

[9] On 14 August 2014, the plaintiff issued to the defendant an invoice for the second instalment (second instalment invoice) which was to be paid by D the defendant on 22 August 2014 according to Annexure A.

[10] The plaintiff's senior general manager, Encik Syed Hasanuddin bin Syed Hashim (plaintiff's deponent), affirmed affidavits on the plaintiff's behalf in this case. E

[11] The plaintiff's deponent sent an email dated 21 August 2014 (plaintiff's email dated 21 August 2014) to Encik Syaril Syamirza bin Mohd Jamil, a director of the defendant (defendant's deponent). The plaintiff's email dated 21 August 2014 requested for the defendant to pay a total of RM3.24 million (first sum), consisting of the second instalment and a F mobilization fee of RM300,000.

[12] The defendant's deponent replied to the plaintiff's email dated 21 August 2014 by way of an email dated 21 August 2014 (defendant's email dated 21 August 2014). The defendant's email dated 21 August 2014 stated as follows (with all its grammatical errors): G

> Documents from your side has yet to complete for us to process anything. We already communicate with your side. Please check with your team.

[13] On 1 September 2014, the plaintiff's deponent sent an email to the defendant's deponent (plaintiff's email dated 1 September 2014) stating the H following:

> As of today, you are 10 days overdue. Please advise that we will pull back vessel should we fail to get payment due within 3 days.

[14] In a meeting at Impiana KLCC Hotel on 10 September 2014 (meeting), the defendant's deponent informed the plaintiff's deponent for the I first time that the vessel's "Dynamic Positioning System" (DPS) had failed

(defendant's allegation regarding DPS) and hence, the vessel was "not fit to be used for its main purpose". At the meeting, the plaintiff's deponent denied the defendant's allegation regarding DPS.

[15] The defendant sent a letter dated 11 September 2014 to the plaintiff (defendant's letter dated 11 September 2014), stating, among others:

(a) on 10 September 2014, the defendant's representative had conducted an inspection of the vessel and had discovered "major mechanical and software defects on the vessel" which was within the plaintiff's knowledge;

(b) since 15 August 2014, there was a breakdown of the equipment on the vessel as well as a breakdown of the vessel. Consequently, the plaintiff had failed to perform its obligations under the contract;

(c) the defendant exercised its right under cl. 31(b)(v) and (vii) of part 2 to terminate the contract; and

(d) the defendant reserved its right to claim from the plaintiff for any loss caused by the plaintiff.

[16] The plaintiff replied to the defendant's letter dated 11 September 2014 by way of the plaintiff's letter dated 19 September 2014 to the defendant (plaintiff's letter dated 19 September 2014). In the plaintiff's letter dated 19 September 2014, the plaintiff accepted the defendant's early termination of the contract and demanded the defendant to pay a total of RM3,635,300 (second sum) consisting of charter hire for 54.837 days (from 1.40am, 17 July 2014 to 9.45pm, 9 September 2014), mobilization fee and demobilization fee.

[17] The plaintiff's deponent has sent messages by way of "WhatsApp" to request for payment from the defendant and the defendant's deponent replied on 23 October 2014, "Next week boss" (defendant's admission).

[18] The defendant sent a letter dated 30 October 2014 to the plaintiff (defendant's letter dated 30 October 2014) which stated, among others:

(a) the defendant denied any liability on the defendant's part to pay the second sum to the plaintiff as stated in the plaintiff's letter dated 19 September 2014;

(b) the defendant repeated the defendant's allegation regarding DPS and the averments in the defendant's letter dated 11 September 2014;

(c) due to the plaintiff's breach of the contract, the defendant had suffered loss, including PCSB's decision to discontinue the defendant's services and contract; and

(d) the defendant claimed for a total sum of RM12,656,406 consisting of:

(i) the return of the first instalment;

(ii) RM2,940,000 for charter hire for 30 days from 17 July 2014 until the date the defendant terminated the contract (defendant's loss of charter hire); and

(iii) RM6,776,406 in respect of the defendant's loss of contract from PCSB (defendant's loss of contract).

[19] In reply to the defendant's letter dated 30 October 2014, the plaintiff sent a letter dated 10 November 2014 (plaintiff's letter dated 10 November 2014) which stated, among others:

(a) the plaintiff had reviewed the matter;

(b) the trial of the DPS had been conducted with satisfactory results whereby the vessel had been hired by the defendant and was "endorsed" by TMS on 17 July 2014. The plaintiff had operated the vessel "very closely" with TMS and PCSB and no complaint had been received by the plaintiff from TMS and PCSB. The plaintiff therefore denied that the vessel was not fit to be used for its main purpose;

(c) the plaintiff's liability was limited by cl. 13(b) to suspension of hire. Furthermore, cl. 14(c) of Part 2 has provided that no party shall be liable for any consequential damage arising from the performance or non-performance of the contract; and

(d) the plaintiff claimed a sum of RM4,145,829.60 (third sum) to be paid by the defendant to the plaintiff as of 20 October 2014 and if this sum was not paid within ten days from the plaintiff's letter dated 10 November 2014, the plaintiff would instruct its solicitors to institute legal proceedings against the defendant. The third sum consisted of the following:

(i) charter hire for approximately 55 days amounting to RM2,435,300;

(ii) mobilization and demobilization fees of RM1.2 million as provided in Annexure A; and

(iii) cost for bunker and meals amounting to RM510,529.60.

[20] The plaintiff's deponent has been informed by TMS's chief executive officer, Encik Azmel Hafiz (Encik Azmel), by way of an exchange of "WhatsApp" messages (WhatsApp conversation between plaintiff's deponent and Encik Azmel) that the defendant has been paid by TMS in July and August 2014 a total sum of RM6,287,756 (TMS's payment to defendant). A copy of the WhatsApp conversation between the plaintiff's deponent and Encik Azmel has been exhibited in this case.

A **This Suit**

[21] The plaintiff filed this originating summons in court enclosure no. 1 (OS) on 15 January 2015 and prayed for, among others, the following relief:

(a) an order to restrain the defendant from parting with, encumbering by
B security or otherwise, transferring, disposing, dissipating, removing from jurisdiction of Malaysian court (this jurisdiction), diminishing the value of and/or otherwise dealing with the defendant's assets within this jurisdiction, in so far as the same does not exceed the sum of RM4,145,829.60 (claimed sum), including but not limited to:

C (i) any credit balance or balance up to the amount of the claimed sum in any bank account of the defendant (whether solely or jointly with any third party) or wherein the defendant has an interest (in any capacity whatsoever) in the banks and financial institutions listed in encl. A (listed banks); and/or

D (ii) fixed deposit accounts up to the amount of the claimed sum held in the listed banks in the name of the defendant (whether solely or jointly with any third party) or wherein the defendant has an interest (in any capacity whatsoever)

- pending the conclusion of arbitral proceedings (first prayer);
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(b) an order to restrain the defendant from parting with, transferring, disposing, dissipating, removing from this jurisdiction any sum received by the defendant from TMS and/or any relevant third party, pending the final conclusion of arbitral proceedings (second prayer);

F (c) in the alternative, an order that the claimed sum be paid into a joint account in the names of the plaintiff and defendant respectively, pending the conclusion of arbitral proceedings (third prayer);

(d) an order that the defendant, whether acting through its servants or agents or otherwise by any manner whatsoever, within seven days from the
G service of this order, disclose to the plaintiff by way of an affirmed affidavit regarding the full value of assets owned by the defendant, with full particulars regarding the nature, quantity and location of those assets, whether within this jurisdiction or otherwise, and whether held in the personal name of the defendant's directors or nominees and
H whether owned solely or jointly (fourth prayer); and

(e) nothing in this order shall prevent the defendant from spending RM10,000 a week for its ordinary business and operational expense and any reasonable sum that this court thinks fit on legal advice and representation (fifth prayer).
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[22] In addition to the OS, the plaintiff also filed an *ex parte* notice of application for interlocutory relief as per the first to fifth prayers pending the disposal of the OS (court encl. no. 5).

[23] As court encl. no. 5 applies for, among others, a *Mareva* injunction in the first prayer, secrecy is essential and the purpose of the first prayer will be defeated if notice of court encl. no. 5 is given to the defendant – *Chin Wai Hong & Anor v. Lim Guan Hoe & Anor* [2014] 1 LNS 1438; [2014] 5 AMR 427, at 449-452. Accordingly, I heard court encl. no. 5 on an *ex parte* basis as allowed by O. 29 r. 1(2) of the Rules of Court 2012 (RC).

[24] At the *ex parte* hearing of the court encl. no. 5:

(a) I was aware that the plaintiff had not commenced arbitral proceedings within the meaning of s. 23 AA. Section 23 AA reads as follows:

> Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent;

(b) despite the fact that the plaintiff had not commenced arbitral proceedings against the defendant, based solely on the plaintiff's affidavit in support of court encl. No. 5, this court was satisfied that the first, fourth and fifth prayers should be granted pending the disposal of the OS (*ex parte* order). I will explain later in this judgment the grounds for granting the *ex parte* order; and

(c) I did not grant the second and third prayers for the following reasons:

(i) the plaintiff's rights under the contract are sufficiently preserved pending the disposal of the OS by the *ex parte* order;

(ii) the following cases illustrate the court's reluctance to grant the third prayer:

(1) in *Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd* [1996] 3 CLJ 483, at 492; [1996] 2 MLJ 605, at 612 and 613, Gopal Sri Ram JCA delivered the following judgment of the Court of Appeal:

> Third and lastly, *Encik Lazar criticized the learned judge's order, made suo motu, requiring the appellants to deposit a sum of RM300,000 within two weeks from the date of his order. He argued that the effect of the judge's order was to accord the respondent priority over other creditors and to place it in the position of a secured creditor. This, he said, was contrary to the purpose of the Mareva jurisdiction. …*
>
> *We are in agreement with Encik Lazar. In our judgment, it was quite wrong for the learned judge to have imposed the condition in question. There is nothing in his judgment to show that he was*

A *alive to the effect which this part of his order would have. It cannot be gainsaid that the condition he imposed offended the principles governing the Mareva jurisdiction.*

(emphasis added); and

B (2) in *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd* [2010] 1 LNS 1834, pending two arbitrations, the plaintiff company applied for an order in two suits to direct the defendant company to set aside a certain sum of money and to place the sum in an interest-bearing bank account in the joint names of the solicitors for both the plaintiff and defendant companies. Such C an application is similar to the third prayer in this case. Mohamad Ariff Md Yusof J (as his Lordship then was) in the High Court refused the application in *Cobrain Holdings Sdn Bhd*; and

D (iii) the third prayer is an interlocutory mandatory injunction which compels the claimed sum to be paid into a joint bank account in the names of the plaintiff and defendant. I have expressed the view in *Chin Wai Hong*, at pp. 436-444, that our apex courts have decided twice, first by the Supreme Court in *Tinta Press Sdn Bhd v. Bank Islam (M) Bhd* [1987] 1 CLJ 447; [1987] CLJ (Rep) 396; [1987] 2 MLJ E 192, at 193-194, and then by the Federal Court in *Karuppannan Chellapan v. Balakrishnen Subban* [1994] 4 CLJ 479, at 487, that an interlocutory mandatory injunction should only be granted in an "unusually strong and clear" or "unusually sharp and clear" test. The "unusually strong and clear" or "unusually sharp and clear" test F for interlocutory mandatory injunctions, in my opinion, is a higher threshold than "a good arguable case" for an interlocutory *Mareva* injunction (which will be elaborated below).

[25] It is to be noted that my refusal to grant the second and third prayers (court's refusal of second and third prayers) falls within the phrase "order of G any High Court in any civil cause or matter" in s. 67(1) of the Courts of Judicature Act 1964 (CJA). Accordingly, the court's refusal of second and third prayers is appealable to the Court of Appeal. This is clear from the Court of Appeal's judgment given by NH Chan JCA in *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377, at 380-382; [1999] 2 MLJ H 696, at 700-702, as follows:

> Before we close with this judgment, we must also deal with a point which counsel for the respondent (plaintiff) had raised before us in order to pre-empt the appeal. Counsel argued that this appeal is not maintainable because we are bound by this court's decision in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 MLJ 321. He contended that the Court of Appeal in I the Anwar decision has held, at p 329H: 'that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*,

and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 [CJA], and therefore is not appealable'. The order of the High Court which struck off the defendant's application and which is now the defendant's appeal, argued counsel, concerned the defendant's application to set aside an interim order for a *Mareva* injunction and a mandatory order and, therefore, applying *Anwar*'s case, is not appealable to this court.

In our judgment, this submission is misplaced. *Anwar*'s case was a criminal appeal in which s. 50 [CJA] applies. …

Unlike Anwar's case, the instant appeal is a civil appeal in which s. 67(1) [CJA] applies. …

It is to be noted that the word 'decision' is not used in s. 67(1), so that, there is no compelling reason to refer to s. 3 [CJA] for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s. 3. This is because, in s. 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature.

In our judgment we hold, therefore, that the objection to the jurisdiction of this court to hear and determine this appeal is misconceived and misplaced. This court has the jurisdiction to hear and determine any appeal from the High Court in a civil cause or matter.

(emphasis added)

[26] The plaintiff did not appeal to the Court of Appeal against the court's refusal of second and third prayers under s. 67(1) CJA.

[27] On the first *inter partes* hearing of court encl. no. 5 on 10 February 2015:

(a) both parties consented to a joint hearing of court encl. no. 5 and the OS (joint hearing). This is because in both court encl. no. 5 and the OS:

(i) the same affidavits will be relied on by the parties; and

(ii) the same issues arise (as discussed below).

A joint hearing will therefore ensure an expeditious and economical disposal of both court encl. no. 5 and the OS. Even if court encl. no. 5 is first disposed of, any decision of court encl. no. 5 may bind all parties in respect of the OS by virtue of the following trilogy of Court of Appeal cases, all decided by Gopal Sri Ram JCA (as his Lordship

A then was):

(1) *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, at 114; [1996] 2 MLJ 57, at 66, held as follows:

> We cannot over emphasise the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly; and

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(2) *Hartecon JV Sdn Bhd* has been followed in *Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd* [1997] 1 CLJ 596, at 599-600 and *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553, at 563-566;

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(b) to my surprise, Ms Lavinia Kumaraendran, the plaintiff's learned counsel, informed the court that the plaintiff had yet to commence arbitral proceedings!;

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(c) the court then informed learned counsel for both parties that the plaintiff's delay in instituting arbitral proceedings in this case (plaintiff's delay) would be a relevant consideration to the following two questions to be decided in court encl. no. 5 and the OS:

(i) whether the court should grant or not an *inter partes Mareva* injunction in court encl. no. 5 and the OS; and

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(ii) the issue of costs of court encl. no. 5 and the OS; and

(d) I asked the defendant's learned counsel, Encik Hanif Idris, on whether he had any objection to an *ad interim* injunction of first, fourth and fifth prayers pending the disposal of court encl. no. 5 and the OS (*ad interim* injunction). Encik Hanif Idris properly conceded that he could not object to an *ad interim* injunction. Such a concession is rightly made in the light of the following Federal Court's judgment given by Raus Sharif PCA in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor* [2014] 1 CLJ 18, at 42-43:

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> [27] The question now is, whether it is proper to split the hearing of interim injunction application by separating the balance of convenience argument to be argued and heard separately to set aside an *ad interim* injunction. We have considered the submissions urged on us by learned counsel for the first defendant and with respect we are unable to accede to their contentions. *It is the standard practice of our courts, that after the grant of the ad interim injunction (pending the inter partes hearing) to move on to the hearing of the inter partes injunction. Parties will then ventilate all issues and their respective contentions in the inter partes hearing of the injunction itself. In this regard we are reminded of the observations made by His Lordship Abdul Hamid bin Mohamed JCA (as he then was) in RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83; [2002] 2 AMR 2457 which we are inclined to adopt in similar vein. His Lordship Abdul Hamid bin Mohamed JCA noted that the*

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> *ad interim injunction to maintain the status quo pending the inter partes hearing is quite often agreed between the parties. Even if they do not agree the court has the jurisdiction to make such an order. The court has the jurisdiction to grant the ad interim injunction even in the event the parties disagree*. From the observations made by His Lordship Abdul Hamid Mohamed we can safely conclude that in the interest of smooth and expeditious administration of justice, parties should expeditiously move forward to the hearing of the *inter partes* injunction on the merits.
>
> (emphasis added)

Based on *Petrodor Operating Co Ltd*, even if the defendant had objected to the *ad interim* injunction, this court should still nevertheless grant the *ad interim* injunction so as to preserve the status quo pending the disposal of court encl. no. 5 and the OS.

[28] In compliance with the mandatory disclosure order in the *ex parte* order, the defendant has affirmed three affidavits which have disclosed all the defendant's assets (defendant's three disclosure affidavits).

[29] The defendant did not apply to set aside the *ex parte* order which had lapsed on 11 February 2015, after the expiry of 21 days from 21 January 2015 (the date the *ex parte* order was granted), as provided in O. 29 r. 1(2B) RC.

[30] The plaintiff's solicitor sent a notice of arbitration dated 11 February 2015 together with all the relevant documents regarding this case to the defendant (arbitration notice). The plaintiff's solicitor also sent a letter dated 11 February 2015 to the director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) to inform the KLRCA of the plaintiff's intention to commence arbitral proceedings against the defendant. As such, for the purpose of court encl. no. 5 and OS, arbitral proceedings have been commenced by the plaintiff against the defendant within the meaning of s. 23 AA.

[31] The *ex parte* order and *ad interim* injunction have frozen an amount of RM1,559,470.06 to the credit of the defendant in the defendant's bank account (frozen sum).

Submission Of Parties

[32] Ms Lavinia Kumaraendran has contended that court encl. no. 5 and the OS should be allowed under s. 11(1)(f) and (h) AA because:

(a) the plaintiff has a "good arguable case" against the defendant for the defendant's wrongful repudiation of the contract. In this regard, the plaintiff has submitted that the defendant's loss of charter hire and defendant's loss of contract were "bogus claims to evade and/or delay" the defendant's payment of the claimed sum to the plaintiff;

(b) the defendant has assets within this jurisdiction;

(c) there is a real risk the defendant will dissipate its assets and this can be inferred from the defendant's conduct and lack of probity; and

(d) the balance of convenience is in favour of granting the *Mareva* injunction in this case.

[33] The following cases, among others, have been cited by the plaintiff in support of court encl. no. 5 and the OS:

(a) Mary Lim Thiam Suan J's decision in the High Court case of *Metrod (Singapore) Pte Ltd v. GEP II Beteiligungs Gmbh & Anor* [2013] 1 LNS 324; [2013] MLJU 602;

(b) the House of Lords' judgment in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334;

(c) the English Court of Appeal case of *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1980] 1 All ER 213;

(d) the Court of Appeal case of *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754; [1998] 4 MLJ 1;

(e) Edgar Joseph Jr J's (as his Lordship then was) judgment in the High Court in *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319; [1984] 2 MLJ 143;

(f) the Court of Appeal's decision in *Ang Chee Huat v. Thomas Joseph Engelbach* [1995] 2 CLJ 893; [1995] 2 MLJ 83; and

(g) Jeffrey Tan J's (as his Lordship then was) judgment in the High Court case of *Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd* [1999] 4 CLJ 30; [1999] 4 MLJ 217.

[34] Encik Hanif Idris advanced the following arguments to oppose court encl. no. 5 and the OS:

(a) it was a condition of the contract that the DPS must be inspected by an independent third party before the vessel was mobilized and delivered by the plaintiff to the defendant (independent inspection condition). There was no inspection of the DPS by an independent third party because the plaintiff was fully aware that the DPS was not functioning. Hence, the plaintiff had breached the independent inspection condition;

(b) the plaintiff had misrepresented to the defendant that the DPS was functional (alleged plaintiff's misrepresentation);

(c) on 28 August 2014, without informing the defendant, the plaintiff removed the DPS from the vessel for repair. The plaintiff had therefore concealed the faulty DPS from the defendant (alleged plaintiff's concealment);

(d) the plaintiff had breached the contract due to the defective DPS (alleged plaintiff's breach); A

(e) the alleged plaintiff's misrepresentation, alleged plaintiff's concealment and alleged plaintiff's breach had caused loss of income to defendant, including the discontinuance of the defendant's contract by TMS; B

(f) the plaintiff's delay:

(i) was *mala fide*;

(ii) constituted an abuse of court process; and

(iii) prejudiced the defendant by prolonging the disposal of court encl. no. 5 and the OS; C

(g) s. 11(1)(f) AA does not apply in this case as there is no "property which is the subject matter of the dispute" to be preserved. This case concerns solely the question of payments for the use of the vessel. Reliance was placed on Abdul Aziz Rahim J's (as his Lordship then was) judgment in the High Court case of *Ikatan Innovasi Sdn Bhd v. KACC Construction Sdn Bhd* [2008] 3 CLJ 48; D

(h) the plaintiff should have applied to the arbitral tribunal for interim relief under s. 19(1)(d) AA and not to court. This is because by applying to court, as has been done by the plaintiff in this case, this will be tantamount to the court dealing with the merits of the dispute in this case which should be in the "sole domain" of the arbitral tribunal; E

(i) there is no "solid evidence" of dissipation of the defendant's assets in this case. The defendant denies lack of probity on its part. In fact, the defendant's three disclosure affidavits, demonstrate that the defendant has no intention to put its assets out of the reach of the plaintiff; F

(j) the balance of convenience lies in favour of dismissing court encl. no. 5 and the OS because:

(1) the defendant has an active on-going business. In January, 2015, the defendant has expenses amounting to RM610,115.70. If a *Mareva* injunction is granted pending the disposal of arbitration, the defendant will be hindered from continuing with its business; and G

(2) the defendant has an existing contract with Dinastia Jati Sdn Bhd (DJSB). The defendant has received a letter from DJSB stating that DJSB would sue the defendant for a cheque issued by the defendant on 30 January 2015 for a sum of RM510,000 which has been rejected due to the *Mareva* injunction (in the *ex parte* order); and H

(k) if court encl. no. 5 and the OS are allowed, this will result in the plaintiff being placed as a secured creditor of the defendant which is contrary to the purpose of a *Mareva* injunction. I

[35] The defendant has cited, among others, the following cases in resisting court encl. no. 5 and the OS:

(a) Mary Lim Thiam Suan J's judgment in the High Court in *Jayapadu Oil & Gas Sdn Bhd v. Chersonese Oil Sdn Bhd* [2014] 1 LNS 972;

(b) Mohamad Ariff Md Yusof J's (as his Lordship then was) decision in the High Court case of *Cobrain Holdings Sdn Bhd*;

(c) the Supreme Court case of *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22; [1989] 2 MLJ 153;

(d) the Court of Appeal's decision in *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 CLJ 552; and

(e) the Federal Court case of *S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280; [1985] 1 MLJ 62.

Court's Power To Order *Mareva* Injunction Under Arbitration Act 1952 (1952 Act)

[36] The 1952 Act has been repealed by AA (s. 51(1) AA). Section 13(6) of the 1952 Act provided as follows:

> 13(6) The High Court shall have, for the purpose of and in relation to a reference [to arbitration], the same power of making orders in respect of –
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) **the giving of evidence by affidavit**;
>
> (d) examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of jurisdiction;
>
> (e) **the preservation, interim custody or sale of any goods which are the subject-matter of the reference**;
>
> (f) **securing the amount in dispute in the reference**;
>
> (g) **the detention, preservation** or inspection **of any property or thing which is the subject of the reference**, or as to which any question may arise therein, and authorizing for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorizing any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; and
>
> (h) **interim injunctions** or the appointment of a receiver.
>
> (emphasis added)

[37] In *Jasa Keramat Sdn Bhd*, at pp. 221 and 237, Jeffrey Tan J (as his Lordship then was) granted a *Mareva* injunction until the disposal of arbitration or further order.

Section 11(1) AA

[38] Section 11(1) AA provides as follows:

> Arbitration agreement and **interim measures by High Court**
>
> 11(1) *A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for*:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) **giving of evidence by affidavit**;
>
> (d) appointment of a receiver;
>
> (e) **securing the amount in dispute**;
>
> (f) **the preservation, interim custody or sale of any property which is the subject-matter of the dispute**;
>
> (g) *ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party*; and
>
> (h) **an interim injunction** or **any other interim measure**.
>
> (emphasis added).

Can Court Grant Interim Relief Before Commencement Of Arbitral Proceedings?

[39] Section 11(1) AA enables a party to apply to court "before" the commencement of arbitral proceedings. As such, I am of the view that the court may grant interim relief under s. 11(1) AA before the commencement of arbitral proceedings. The question that now arises is what are the circumstances the court may grant interim relief before the commencement of arbitral proceedings.

[40] Kang Hwee Gee J (as his Lordship then was) in the High Court case of *I-Expo Sdn Bhd v. TNB Engineering Corporation Sdn Bhd* [2007] 1 LNS 304; [2007] 3 MLJ 53, at 56 and 65-66, granted a mandatory injunction allowing the plaintiff company to enter the project site to remove scrap metal even before the commencement of arbitral proceedings. There was however no discussion of s. 11(1) AA in *I-Expo Sdn Bhd*.

[41] Mary Lim Thiam Suan JC (as her Ladyship then was) held as follows in *Itramas Technology Sdn Bhd v. AmBank (M) Berhad & Anor* [2009] 1 LNS 923; [2009] MLJU 855:

A Section 11 [AA] allows for the application of any interim relief including that sought in Enclosure 2. Such an application may be made before or during arbitral proceedings. Since an arbitrator has been appointed in this matter, this application is therefore regularly initiated. The application specifically invokes the court's powers under section 11(1) (f) and (h) – for the preservation, interim custody or sale of any property which is the
B subject-matter of the dispute; or an interim injunction or any other interim measure. The interim injunction sought is to restrain the 1st Defendant from paying and the 2nd Defendant from receiving on the performance or on-demand bond.

The determination of applications made under section 11 is left to the
C entirely to the court's discretion and jurisdiction.

(emphasis added).

It is to be noted that arbitral proceedings have been commenced in *Itramas Technology Sdn Bhd*.

D **[42]** In *Metrod (Singapore) Pte Ltd*, at paras. 15-18, Mary Lim Thiam Suan J held as follows:

15. [AA] allows parties to seek certain interim orders from the Court either before or during arbitral proceedings. …

16. It is important to appreciate that [s. 11 AA] is intended to cover the
E grant of interim reliefs by the Court. *An application for such interim reliefs in the nature as set out at (a) to (h) of section 11(1) is intended to be of an interim nature; and not permanent. It is also intended to support, assist, as well as facilitate the arbitration proceedings*. Support for this approach can be found in *Channel Tunnel Group Ltd v. Balfour Beatty Construction* [1993] AC 334, 365, 365. There, the House of Lords opined that:
F

> *… interim measures of protection… is not to encroach on the procedural powers of the Arbitrators but to reinforce them, and to render them effective the decision which the Arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of*
G *international arbitration.*

17. Learned counsel for the 1st Defendant had chosen to rely on *The Lady Muriel* [1995] 2 HKC 320 in support of what is essentially the same argument; which this Court agrees and adopts. *The provision of powers with the Court to grant such interim measures as well as to vest the*
H *arbitral tribunal power to grant some of the same interim measures in no way and cannot mean that the Court will be encroaching on the parties' choice and preference of dispute resolution*.

18. It is observed that the orders sought here are not confined to the contracting parties. *This application may then be made to Court without having first being made to the arbitral tribunal. This was remarked* in *Cobrain*
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Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd [KL High Court Originating Summons No 24NCC-71-2010 & Another] **citing with approval the Singapore decision** of *NCC International AB v. Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR (R). Bearing in mind the intention of Parliament as reflected in section 8 [AA], it must be that the Court has jurisdiction to hear and grant interim measures even where arbitration has already commenced elsewhere. The simple existence of arbitration cannot be a bar to this application given the terms upon which this power is predicated.

(emphasis added).

[43] Section 44 of the United Kingdom's Arbitration Act 1996 (1996 AA) provides as follows:

44 **Court powers exercisable in support of arbitral proceedings**

(1) *Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*

(2) Those matters are -

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings –

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) **the granting of an interim injunction** or the appointment of a receiver.

(3) *If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.*

(4) *If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.*

A (5) *In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal
B or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) **The leave of the court is required for any appeal from a decision of the court under this section**.

(emphasis added).

C **[44]** It is to be noted that s. 44 of the 1996 Act is very different from our s. 11(1) AA as follows:

(a) s. 44(1) of the 1996 Act expressly provides that the English court's power to order interim relief is subject to the parties' agreement;

D (b) if the parties have not agreed to exclude the court's power under s. 44 of the 1996 Act:

(i) the court may only grant interim relief if the case is one of urgency and the court can only make such orders as the court thinks is necessary to preserve evidence or assets – s. 44(3) of the 1996 Act;
E

(ii) if the case is not one of urgency, the court can only grant interim relief with the permission of the arbitral tribunal or the parties' written agreement – s. 44(4) of the 1996 Act; and

(iii) in any case, the court can only grant interim relief "if or to the
F extent that the arbitral tribunal, … has no power or is unable for the time being to act effectively" – s. 44(5) of the 1996 Act; and

(c) leave of the English High Court is required for any appeal to the Court of Appeal against the English High Court's order under s. 44 of the 1996 Act – s. 44(7) of the 1996 Act.

G **[45]** I am of the considered view that our s. 11(1) AA is much wider than s. 44 of the 1996 Act. Accordingly, English cases on s. 44 of the 1996 Act should be read with caution and can only apply in this country so long as such an application is not contrary to our s. 11(1) AA.

H **[46]** I am mindful of s. 8 AA which embodies a "minimalist" approach by our courts as explained by David Wong JCA in the Court of Appeal case of *Capping Corporation Limited & Ors v. Aquawalk Sdn Bhd & Ors* [2013] 1 LNS 574; [2013] 6 MLJ 579, at 588 and 589. Section 8 AA has been amended by the Arbitration (Amendment) Act 2011 (2011 Amendment Act) and now
I reads as follows:

No court shall intervene in matters governed by [AA] except where so provided in [AA].

(emphasis added)

In my opinion, s. 11(1) AA expressly allows judicial "intervention" in a very limited form – the court may grant interim (and not permanent) relief pending the disposal of arbitration. The court's power to grant interim relief, does not:

(a) deprive parties of their freedom to contract and to agree to resolve disputes by way of arbitration; and

(b) usurp the role and function of an "arbitral tribunal" (defined in s. 2(1) AA as "a sole arbitrator or a panel of arbitrators") to decide the merits of the dispute in question.

[47] Despite the width of s. 11(1) AA, I am of the opinion that an applicant for interim relief under s. 11(1) AA before the commencement of any arbitral proceedings, should satisfy the court of the five following matters (five matters):

(a) the applicant must have a cause of action against the party whom interim relief is sought. In this regard, I rely on a case concerning an application for an interlocutory restraining injunction decided by the Supreme Court in *Khoo Soo Teong v. Khoo Siew Ghim & Anor* [1991] 3 CLJ 2063; [1991] 1 CLJ (Rep) 212; [1991] 3 MLJ 158, at 159. Section 11(3) AA allows Malaysian courts to grant interim relief for "international arbitration, where the seat of arbitration is not in Malaysia" (please see ss. 2(1) and 2(2)(a) AA for the meaning of "international arbitration"). Section 11(3) AA has been introduced by the 2011 Amendment Act and empowers Malaysian courts to give interim relief for a cause of action which arises outside Malaysia;

(b) there must be an "arbitration agreement" as understood in ss. 2(1) and 9(1) to (5) AA;

(c) the relief sought must be interim in nature and cannot be permanent in effect - *Metrod (Singapore) Pte Ltd*. In *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169, at 174; [1998] 6 MLJ 136, at 144, Kamalanathan Ratnam JC (as his Lordship then was) in the High Court adopted the meaning of "interlocutory injunction" and "interim injunction" as follows:

> In *Commercial Litigation: Pre-Emptive Remedies* (3rd Edn), the learned author says this at p 50:
>
> 1. Interlocutory injunctions and interim injunctions
>
> These phrases are often used interchangeably. However, they may be interpreted thus:
>
> (a) Interlocutory injunction: An order to preserve a particular set of circumstances pending full trial of the matters in dispute.
>
> (b) *Interim injunction: An order in the nature of an 'interlocutory injunction' but restraining the defendant only until after a named day or further order* (usually no more than a few days). Such an

A injunction remains in force until a named day, the order (for example) running thus: 'Until 10.30 am on Wednesday 10 August or so soon thereafter as counsel may be heard'.

(emphasis added)

B Based on the above meaning of the word "interim", if the court grants any interim relief under s. 11(1) AA, such relief should only have interim effect and may be subject to the following circumstances:

(i) the court has the subsequent power to vary and/or discharge the interim relief in question; and/or

C (ii) the arbitral tribunal in question should be empowered by the court granting the interim relief, to vary the interim relief if there are subsequent facts or circumstances to necessitate such a variation. If the court granting the interim relief, grants power to the arbitral tribunal to vary the interim relief pending the disposal of D arbitration, there is no necessity for parties to "return" to court for any variation of the interim relief. This will save precious judicial time and effort in hearing any application to vary any interim measure previously granted by the court under s. 11(1) AA.

E I am of the view that there is no power given by the AA to an arbitral tribunal to discharge or set aside any interim relief granted by the court under s. 11(1) AA. Furthermore, it is neither appropriate nor desirable for an arbitral tribunal to do so. If there is any necessity during arbitral proceedings for any party to discharge or set aside any interim measure granted by the court F under s. 11(1) AA, the party has to apply to court for such a purpose;

(d) the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings - *Metrod (Singapore) Pte Ltd*. If arbitral proceedings are not subsequently commenced or if the interim relief in question does not support, assist, aid and/or facilitate the proposed arbitral G proceedings:

(i) the application for and the granting of interim relief may constitute an abuse of court process. In *Z Ltd v. A & Ors* [1982] 1 All ER 556, at 571, Kerr LJ expressed the following view in the English Court of Appeal regarding two possible abuses of *Mareva* injunction:

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> *However, the jurisdiction must not be abused. In particular, I would regard two types of situations as an abuse of it. First, the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself 'judgment-proof'; where it may be invoked, almost as a matter of course, by a plaintiff*

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in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action.

(emphasis added); and/or

(ii) the interim relief granted may oppress the party who is the subject matter of the interim relief.

I must point out that s. 11(1) AA does not provide that the court's power to grant relief is "for the purposes of and in relation to arbitral proceedings" as provided in s. 44(1) of the 1996 Act. It is hoped that the legislature may clarify this matter as the court's power to grant any interim measure under s. 11(1) AA should be "for the purposes of and in relation to arbitral proceedings"; and

(e) arbitral proceedings should be commenced within a reasonable time. Any unreasonable delay in the commencement and/or conduct of arbitral proceedings may:

(i) constitute an abuse of court process; and/or

(ii) oppress the party who is the subject matter of the interim relief.

The applicant for interim relief from court, should adduce affidavit evidence to show reasons:

(1) why arbitral proceedings cannot be commenced within a reasonable time and hence, the need to apply to court for interim relief under s. 11(1) AA; or

(2) if arbitral proceedings have already been instituted, why the applicant is not able to apply for interim relief from the arbitral tribunal and needs to apply to court for such relief.

[48] The court's consideration of the five matters, in my view, may hopefully prevent a party from abusing court process to obtain interim relief, in particular *ex parte* mandatory injunctions, *ex parte Anton Piller* orders and *ex parte Mareva* injunctions, which may oppress the opposing party when:

(a) the applicant has no intention to commence arbitral proceedings;

(b) there is an unreasonable delay in the commencement and/or conduct of arbitral proceedings; and/or

(c) the interim relief in question does not support, assist, aid and/or facilitate the proposed arbitral proceedings.

[49] If the five matters are fulfilled by an applicant, in deciding an application for interim relief under s. 11(1) AA, the court should not decide on the merits of the dispute which should be decided solely by the arbitral

tribunal as agreed by the parties in question. In *Jayapadu Oil & Gas Sdn Bhd v. Chersonese Oil Sdn Bhd* [2014] 1 LNS 972, at para. 23, Mary Lim Thiam Suan J held in the High Court as follows:

> [23] *The Court must also bear in mind that it is to refrain from making any determination on the merits of the claim or the defence when determining whether any bona fide serious issue has been disclosed.* That is a matter for substantive and not interlocutory determination. As pointed out earlier, in an application under section 11 [AA], that is not even for the Court, but for the Arbitral Tribunal to determine. *The Court must therefore be careful in ensuring that it does not stray into; or worse, interfere in that arbitral process and resolution. All that the Court is required to do is identify with precision the related issues and decide whether these issues are serious enough to merit a trial. The interim measures are granted with a view to supporting and reinforcing the arbitration and not to encroach or supplant the process or render ineffective any award that the Arbitral Tribunal may eventually make.*
>
> (emphasis added);

[50] The court's "restraint" in not deciding on the merits of the dispute when the court is hearing an application for interim relief under s. 11(1) AA, is supported by the fact that such an application is decided solely on affidavit evidence. Section 50 AA provides that any application to the High Court under AA shall be made by way of OS as provided in the Rules of the High Court 1980 (now replaced by RC). Order 69 RC does not provide for applications under s. 11 AA. As such, paras. (1) to (4) of O. 28 r. 3C RC apply and allow affidavit evidence to be filed and considered in respect of applications under s. 11 AA. It is trite law that the court cannot and should not decide on any conflict in affidavit evidence. In a case concerning the High Court's refusal to grant an *inter partes* interlocutory injunction pending the disposal of a suit, Jemuri Serjan CJ (Borneo) delivered the following judgment of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461, at 485; [1995] 1 MLJ 241, at 266:

> *At an interlocutory proceeding for an injunction, the court is not called upon nor is it desirable for the court to decide finally on the rights of the parties but the court must be satisfied that there is a serious question to be tried. The court is not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case.*
>
> (emphasis added).

[51] Despite the court not making a final pronouncement on the merits of the dispute in deciding whether to grant interim relief or not under s. 11(1) AA, the court may nevertheless have to assess the strength of the parties' case in deciding certain applications for interim relief, such as *Mareva* injunction applications. I will elaborate on this matter later in this judgment.

[52] In view of the above reasons, especially the court's wide power under s. 11(1) AA to grant interim measures even before the commencement of arbitral proceedings, I reject the defendant's contention that instead of filing the OS, the plaintiff should have applied to the arbitral tribunal for interim relief under s. 19(1)(d) AA. Section 19(1) AA provides as follows:

> 19(1) **Unless otherwise agreed by the parties, a party may apply to the arbitral tribunal for any of the following orders**:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) **giving of evidence by affidavit**;
>
> (d) **the preservation, interim custody or sale of any property which is the subject-matter of the dispute**.
>
> (emphasis added)

If I have acceded to the above submission by the defendant, this will render s. 11(1) AA ineffective and a party to an "arbitration agreement" will not be able to obtain any interim relief in the interest of justice:

(a) before the commencement of arbitral proceedings; or

(b) during arbitral proceedings and before an "award" (defined in s. 2(1) AA) is made by the arbitral tribunal.

Can Court Grant *Mareva* Injunctions Under s. 11(1) AA?

[53] In *Ikatan Innovasi Sdn Bhd*, at pp. 51 and 52, the plaintiff company applied for a *Mareva* injunction pending the disposal of an arbitration which was at an early stage (parties were then in the process of nominating an arbitrator). Abdul Aziz Rahim J (as his Lordship then was) decided as follows in *Ikatan Innovasi Sdn Bhd*, at p. 54:

> [14] Reading s. 11(1)(f) and (g) of the Arbitration Act 2005 quoted above, there is no doubt that the High Court has the power to grant interim relief or measures to a party partaking in an arbitration proceedings before or during the proceedings. *However para. (f) of the section seems to be restricted to preservation of the property which is the subject matter of the dispute before the arbitration proceedings. In this respect, the plaintiff's disputes with the defendant which the plaintiff is referring to the arbitration in this case do not involve any property. The disputes are only related to liquidated sum in the form of payment for works done under a contract. Thus para. (f) of s. 11(1) of the Arbitration Act may not be applicable in this instant.*
>
> [15] *But para. (g) of the same section of the Act, in my opinion, is wider in scope. The language of that paragraph suggests that the High Court may make such order as the court thinks just and appropriate in the circumstances in order to ensure the award that the applicant or plaintiff may obtain in the*

A *arbitration proceedings is not just a hollow piece of paper and of no value, because there is no assets that can be realized from the defendant in order to satisfy the award. The paragraph also does not confine the order that can be made to either movable or immovable assets. Thus, both types of asset may be restrained by the High Court order.*

B (emphasis added)

[54] The majority of the Supreme Court in a decision given by Mohd Azmi SCJ in *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50; [1988] 1 MLJ 97, at 100 and 101, held as follows in affirming the High Court's order of a *Mareva* injunction pending the C disposal of a suit:

On the first ground, this was not the first time that the issue of jurisdiction had been raised. The issue was first canvassed in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 40, where Hashim Yeop A. Sani J. (as he then was) dismissed an application for D *Mareva* on the ground that the relief sought was unknown in Malaysian law as there was no equivalent provision to section 45 of the English Court of Judicature Act 1925. On appeal to the Federal Court [1982] 1 MLJ 260 FC, it was held otherwise, although the appeal was dismissed on factual grounds. *Raja Azlan Shah C.J. (as he then was) ruled that the High Courts in Malaysia had jurisdiction to grant Mareva injunctions in appropriate* E *circumstances since "paragraph 6 of the Schedule to the [CJA] would appear to be the equivalent provision to section 45 of the English Supreme Court of Judicature (Consolidation) Act 1925 …" With respect we agree with that conclusion, because it seems clear that when one relies on paragraph 6 for the remedy of interim preservation of property it must necessarily be done by way of injunction. In our opinion, the additional powers of the High Court conferred by section 25(2) of the* F *1964 Act which under paragraph 6 of the Schedule include the power to provide for "the interim preservation of property the subject matter of any cause or matter … by injunction … or in any manner whatsoever" is wide enough to confer jurisdiction on the High Court to provide for an injunction in the manner of the Mareva. …*

(emphasis added)

G **[55]** Paragraph 6 of the Schedule to CJA (para. 6) reads as follows:

Paragraph 6 Preservation of property

Power to provide for the interim preservation of property the subject matter of any cause or matter by sale or by injunction or the appointment of a receiver or the H *registration of a caveat or a lis pendens or in any other manner whatsoever.*
(emphasis added)

[56] Paragraph 6 (interim preservation of property the subject matter of any cause or matter) is similar to s. 11(1)(f) AA (preservation, interim custody or sale of any property which is the subject-matter of the dispute). I Accordingly, based on *Aspatra Sdn Bhd*, I am of the view that the court may

grant a *Mareva* injunction before or during arbitral proceedings under s. 11(1)(f) AA. I am also of the opinion that the court is empowered to order a *Mareva* injunction before or during an arbitration under the following paragraphs of s. 11(1) AA:

(a) paragraph (g) (ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party) - *Ikatan Innovasi Sdn Bhd*, at p. 54. In *S & F International Ltd*, at p. 64, Abdoolcader FJ (as his Lordship then was) in the Federal Court, followed Lloyd J's decision in the English High Court case of *PCW (Underwriting Agencies) Ltd v. Dixon & Anor* [1983] 2 All ER 158, at 162, which had decided that "the sole purpose of a *Mareva* injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction"; and

(b) para. (h) (an interim injunction).

[57] In respect of s. 11(1)(e) AA (securing the amount in dispute), I do not think such a paragraph may be relied on in respect of the court's power to grant *Mareva* injunctions. My view is premised on the following reasons:

(a) in *S & F International Ltd*, at p. 64, Abdoolcader FJ adopted the reasoning of English cases and held that "a *Mareva* injunction was never intended to put a plaintiff in the position of a secured creditor". The Court of Appeal in *Motor Sports International Ltd*, at p. 492 (CLJ); pp. 612-613 (MLJ), has affirmed *S & F International Ltd* on this point. Accordingly, when the court grants a *Mareva* injunction, the plaintiff is not placed in a position of a secured creditor *vis-à-vis* the defendant; and

(b) as explained above, s. 11(1) AA merely empowers the court to grant interim (not permanent) relief to support, assist, aid or facilitate arbitration. Section 11(1)(e) AA is not, in my view, intended to confer security interest or to amend the law on priority of claims in cases of insolvency. As such, s 11(1)(e) AA should not be construed so widely so as to confer priority on a party in a dispute to be resolved by way of an arbitration.

It is to be noted that s. 44 of the 1996 Act does not have a provision similar to s. 11(1)(e) AA. To avoid any confusion that s. 11(1)(e) AA confers priority on a party's claim, it is hoped that the legislature may consider removing such a paragraph.

[58] In deciding whether to grant a *Mareva* injunction under s. 11(1)(f), (g) and (h) AA before or after during arbitral proceedings, I adopt the same following tests as applied by cases in respect of *Mareva* injunctions pending disposal of suits:

A (a) the plaintiff should have a "good arguable case";

(b) the defendant has assets within this jurisdiction;

(c) there is a risk of dissipation of the defendant's assets; and

B (d) the balance of convenience should be in favour of granting the *Mareva* injunction.

[59] I note that whether a court grants a *Mareva* injunction or not, is an exercise of judicial discretion dependent on the particular facts adduced in that court. Accordingly, judgments on these matters are purely illustrative and have no binding effect from the perspective of the *stare decisis* doctrine. C In *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300, at 306, the Court of Appeal decided as follows:

> Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case.

D *Can Mandatory Disclosure Orders Be Given Under s. 11(1) AA?*

[60] Before the enforcement of s. 11 AA, Malaysian courts have granted mandatory disclosure orders in aid of *Mareva* injunctions - *Tycoon Realty Sdn Bhd*, at p. 698.

E **[61]** I am of the view that the following paragraphs of s. 11(1) AA empower the court to give mandatory disclosure orders:

(a) para. (c) AA (giving of evidence by affidavit);

(b) para. (g) – to ensure that any arbitral award is not rendered ineffectual by the dissipation of assets by a party. Without a mandatory disclosure F order, the *Mareva* injunction may not be effective and the arbitral award may be rendered "ineffectual" by a party's dissipation of assets; and

(c) para. (h) (any other interim measure).

[62] I must make clear that the defendant in this case has not claimed any G privilege against self-incrimination. In fact, the defendant has filed and served the defendant's three disclosure affidavits. The defendant has not applied to this court to expunge the defendant's three disclosure affidavits. There is thus no necessity to discuss in this case the effect of the privilege against self-incrimination. This case is unlike the House of Lords' case of H *AT & T Istel Ltd & Anor v. Tully & Ors* [1992] 3 All ER 523, where the first and second defendants challenged successfully the validity of *ex parte* mandatory disclosure order and *ex parte* "discovery of documents" order in aid of *ex parte Mareva* injunction (now known as a "freezing injunction" in r. 25.1(1)(f) of the Civil Procedure Rules 1998) on the ground that I compliance with such mandatory disclosure and discovery orders:

(a) violated the right of the first and second defendants not to incriminate themselves; and

(b) would expose the first and second defendants to a risk of prosecution. A

Should *Mareva* Injunction Be Ordered In This Case?

[63] In this case, it is not disputed that the defendant has assets within this jurisdiction. This is clear from the frozen sum and the defendant's three disclosure affidavits. B

Meaning Of "Good Arguable Case"

[64] The following cases explain what is required of a plaintiff to prove a "good arguable case":

(a) Abdoolcader FJ (as his Lordship then was) held in *S & F International Ltd*, at p. 283 (CLJ); p. 64 (MLJ), as follows: C

> Mustill, J., held in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 [1983] 1 WLR 1412 on appeal to CA that: (1) *Before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty per cent chance of success*; D
> (emphasis added);

(b) Gopal Sri Ram JCA (as his Lordship then was) in the Court of Appeal case of *Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 at 905; [1995] 2 MLJ 213, at 221, decided as follows: E

> *The appellants were, as I surmise, applying for a Mareva injunction. As such, the relative strength or weakness of the defence filed during the very early stages of the action is extremely relevant in assessing whether the plaintiff has an arguable case. It is a higher standard than that applicable to the usual application for an injunction*. (See *The Tatiangela* [1980] 2 Lloyd's Rep 193.) That this ought to be so is not in the least surprising: for the allegation made is that there is a risk of the defendant dissipating his assets with a view to defeating any judgment that the plaintiff may obtain against him. *Since the relief is postulated upon a plaintiff's success in the main action, for example, damages, it is only right and proper that the strength of his case be tested to ascertain how high the probabilities lie in favour of his ultimate success. The higher the degree of success, the greater is the need to protect that event by ensuring that he does not get a judgment that is as good as writ on running water. This, then, is the philosophy of the Mareva jurisdiction as distilled from the authorities upon the subject*. F G H
>
> *When a judge comes to assess the strength of a plaintiff's case, it is a natural and essential part of that exercise to undertake an examination of the defences taken to the main action. The stronger the defence on its face, the less likely that the plaintiff will succeed in his action; and less the reason to grant him interim protection. To invert the proposition, the weaker the defence on its face, the greater is the probability of the plaintiff's success in getting his* I

judgment. That in my view is the correct approach to be adopted. The English Court of Appeal in an unreported case adopted the same approach. (See *Fary Jones Insurance Ltd v. IFM Funding GmbH*, decided on 10 April 1979.)
(emphasis added);

(c) in *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754 at 759; [1998] 4 MLJ 1, at 5, Haidar JCA (as his Lordship then was) delivered the following judgment of the Court of Appeal:

What is a good arguable case is difficult to define. The respondents need not show that they have a case so strong as to warrant summary judgment nor even a strong prima facie case. It would generally be sufficient if the respondents can show on the evidence available, there is a fair chance that they will obtain judgment against the appellants (see *Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen* [1984] 1 All ER 398, on appeal to CA [1984] 1 All ER 413; [1983] 1 WLR 1412).

(emphasis added);

(d) in *Lien Hoe Sawmill Co Sdn Bhd v. Yap Sing Hock & Ors* [1992] 2 CLJ 1022; [1992] 2 CLJ (Rep) 727, at 731, Zakaria Yatim J (as his Lordship then was) held as follows in the High Court:

From the above authorities, it appears that the defendant is entitled to argue that he has a good arguable defence. It is not any arguable defence. To quote Lord Denning in Esefka International case, the defendant must establish that "... There is so much defence to be raised ... that it would not be a case where the plaintiffs have a really good arguable case to succeed". I agree with Mr. Naban when he said in his written submission that in order to discharge a Mareva injunction a defendant must show such a defence which by its nature goes to the heart of the plaintiff's case such that the plaintiff can no longer be regarded as having a good arguable case.

(emphasis added); and

(e) Abdul Aziz Rahim J (as his Lordship then was) held as follows in *Ikatan Innovasi Sdn Bhd*, at p. 54:

[13] As for the requirements for a *Mareva injunction*, the law requires the plaintiff (a) to show a good arguable case; (b) to produce evidence that the defendant has assets within the jurisdiction, and (c) to show that there is risk of the defendant's assets being removed from the court jurisdiction. These requirements have been stated in *S & F International Ltd v. TransCon Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280. *The standard of arguable case here does not mean that the judge must believe the plaintiff's case or that the plaintiff's case has more than fifty percent chance of success at the trial. What it meant is that the materials produced for the judge's consideration whether or not to grant Mareva injunction are sufficient for the court to look seriously into the allegation by the plaintiff or the applicant.*

(emphasis added).

Plaintiff Has A "Good Arguable Case"

[65] I am satisfied that the plaintiff has a valid cause of action against the defendant for breach of the contract (defendant's breach) when the defendant:

(a) fails to pay the second instalment on 22 August 2014 as stipulated in Annexure A; and

(b) wrongfully terminated the contract by way of the defendant's letter dated 11 September 2014.

[66] The plaintiff has a "good arguable case" in respect of the defendant's breach as understood in *S & F International Ltd*, *Hock Hua Bank (Sabah) Bhd* and *Biasamas Sdn Bhd*. I decide as such for the following reasons:

(a) the second instalment invoice has been issued on 14 August 2014 and the second instalment should have been paid by the defendant to the plaintiff in accordance with Annexure A, Box 23 (part 1) and cl. 12(a) (part 2) (upon the plaintiff's issuance of the second instalment's invoice);

(b) the plaintiff's email dated 21 August 2014 requested for payment of the first sum (consisting of, among others, the second instalment) by the defendant;

(c) the defendant's email dated 21 August 2014 stated that payment of the first sum was delayed due to incomplete documents on the plaintiff's part. The defendant's email dated 21 August 2014 did not refer to any problem with the DPS. Nor did the defendant's email dated 21 August 2014 raise anything concerning the alleged plaintiff's breach;

(d) the defendant's admission on 23 October 2014 that the defendant would pay the second sum on the following week after the defendant's admission. The defendant's admission is clearly inconsistent with the defendant's allegation regarding DPS, the alleged breach of the independent inspection condition by the plaintiff, the alleged plaintiff's misrepresentation, the alleged plaintiff's concealment and the alleged plaintiff's breach. Significantly, the defendant's admission was made after:

(i) the meeting on 10 September 2014; and

(ii) the defendant's letter dated 11 September 2014.

If there was no basis for the plaintiff's claim against the defendant in the OS, why was the defendant's admission made?;

(e) the defendant's allegation regarding DPS, the alleged breach of the independent inspection condition by the plaintiff, the alleged plaintiff's misrepresentation, the alleged plaintiff's concealment and the alleged plaintiff's breach

- do not go to the heart of the plaintiff's case such that the plaintiff can no longer be considered as having a "good arguable case" within the meaning explained in *Lien Hoe Sawmill Co Sdn Bhd*. My decision is based on the following reasons:

(i) despite all the above averments by the defendant, the defendant's admission was made unequivocally on 23 October 2014 without any condition and qualification;

(ii) if the vessel was not fit for the purpose of the contract, the defendant could not have successfully sub-hired the vessel to TMS and TMS's payment to defendant (as evidenced in the WhatsApp Conversation between plaintiff's deponent and Encik Azmel) would not have been made. If the vessel was not fit for the purpose of the contract, a "chain of claims and suits" would have ensued as follows:

(1) TMS would not only have demanded for the return of TMS's payment to defendant but TMS would have also claimed for damages from the defendant for breach of contract between the defendant and TMS;

(2) TMS would have breached its contractual obligations to PRSB and this in turn would attract a claim from PRSB against TMS; and

(3) PCSB would have complained to PRSB about the "unfitness" of the vessel and PCSB would terminate its agreement with PRSB. This would then result in legal proceedings between PRSB and PCSB;

(iii) the following contemporaneous documents, in chronological order, do not support the defendant's allegation regarding DPS:

(1) there is a ship classification society named "American Bureau of Shipping" (ABS) which conducts annual trials of DPS. ABS has conducted a trial of the vessel's DPS on 11 July 2014. Earlier, on 26 September 2013, ABS has issued a certificate, "Flag State Verification and Acceptance Document", for the vessel's DPS which remains valid until 23 June 2018. There is no evidence to show that this certificate has been wrongly issued by ABS;

(2) the "Pre-Operational DP Checklist" dated 16 July 2014 and the "Pre DP Operation & Hourly DP Checklist" dated 16 July 2014, did not show the malfunction of the DPS;

(3) the "statement of fact" prepared by TMS on 17 July 2014, certified that TMS had accepted the vessel from the defendant. This document had been signed by representatives from the plaintiff, defendant and TMS. There has been no complaint

from TMS that such a document has been erroneously signed by TMS. It is to be noted that TMS is an independent party in this case;

(4) the "On Hire Certificate" has been signed by representatives from the plaintiff, defendant and TMS on 17 July 2014. Once again, there has been no complaint from TMS regarding the contents of "On Hire Certificate";

(5) "Preliminary Observation List, Conditional Survey of (Vessel)" dated 8 September 2014, was prepared by Petronas Marine Services Sdn Bhd (PMSSB) based on an inspection of the vessel by PMSSB on 17 July 2014. PMSSB provides marine and consultancy service to the Petronas group of companies, including PCSB. In this case, PCSB had requested PMSSB to inspect the vessel on 17 July 2014. This report by PMSSB, did not show the malfunction of the DPS. PMSSB is clearly independent in this case. If the DPS was not in good working order, PMSSB would have advised PCSB not to hire the vessel from PRSB; and

(6) PMSSB sent a letter dated 8 September 2014 to the defendant regarding PMSSB's inspection of the vessel on 17 July 2014 (PMSSB's letter dated 8 September 2014). PMSSB's letter dated 8 September 2014 did not state that the vessel's DPS had malfunctioned. There is no evidence that PMSSB has wrongly issued PMSSB's letter dated 8 September 2014 and has thereby retracted such a letter;

(iv) the plaintiff itself has a business relationship with PCSB and PRSB. If the vessel's DPS did not work properly, PCSB and PRSB would have complained directly to the plaintiff. There is no evidence of any dissatisfaction on the part of both PCSB and PRSB regarding the performance of the vessel's DPS; and

(v) the defendant adduced certain emails between the employees of the plaintiff and defendant in exh. "SSMJ-6" (SSMJ-6 emails). The defendant contended that the SSMJ-6 emails showed that the plaintiff had knowledge of the need for an inspection of the vessel's DPS by an independent third party. I am not able to place any weight on the SSMJ-6 emails because such emails have been redacted. The entire contents of the SSMJ-6 emails have not been placed before this court so as to enable the court to discharge its judicial duty in deciding court encl. no. 5 and the OS in respect of the weight to be attached to the SSMJ-6 emails. In any event, the SSMJ-6 emails do not show the malfunction of the vessel's DPS. Nor do the SSMJ-6 emails show that the alleged plaintiff's concealment and the alleged plaintiff's breach; and

(f) Clause 13(b) bars the defendant from claiming for the defendant's loss of charter hire and the defendant's loss of contract. According to cl. 13(b), the defendant can only claim for "suspension of hire" from the plaintiff and nothing more.

Risk Of Dissipation Of Assets

[67] Regarding the risk of dissipation of assets, I am guided by the following case law:

(a) it was decided in *S & F International Ltd*, at p. 283 (CLJ); p. 64 (MLJ), as follows:

> (2) *Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, e.g. that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice; … , and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.*
>
> (emphasis added);

(b) Mohamed Azmi SCJ delivered the following judgment of the Supreme Court in *Creative Furnishing Sdn Bhd*, at p. 25 (CLJ); p. 155 (MLJ):

> On the facts of the appeal before us, *the respondent must satisfy the court firstly, that he had a good arguable case; secondly, that the appellant had assets within jurisdiction, and thirdly, that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk. In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in this appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment.*
>
> (emphasis added);

(c) in *Ang Chee Huat v. Thomas Joseph Engelbach* [1995] 2 CLJ 893, at 899; [1995] 2 MLJ 83, at 89, Zakaria Yatim JCA (as his Lordship then was) held as follows:

> The learned judicial commissioner made the following finding in his grounds of judgment:
>
> > … it is my finding *that the plaintiff has shown that there is a danger that the defendant's available assets will be dissipated to prejudice the plaintiff's claim … To me, his conduct shows that he is a trustee who intends to default and will do what he can to avoid having to meet his obligation … The defendant's letter to the plaintiff dated 20 November 1990, revoking the trust only serves to confirm*

that his actions are akin to a long term fraud by the build-up of confidence to be followed by default … I have taken into account the defendant's evidence as well as the plaintiff's and I cannot find anything to support his opposition to the application – there is solid evidence that the probity of the defendant cannot be relied on.

I agree with the finding of the learned judicial commissioner. Having considered the evidence, I am of the view that the conduct of the appellant in this matter is lacking in probity and honesty. In the circumstances, I conclude that there is a real risk that the assets of the appellant will dissipate should the respondent succeed at the trial.

(emphasis added);

(d) Edgar Joseph Jr J (as his Lordship then was) held as follows in the High Court case of *Pacific Centre Sdn Bhd*, at p. 326 and 328 (CLJ); p. 148, 149 and 150 (MLJ):

In determining the third element, namely, the dissipation of assets, I have kept in the forefront of my mind, on the one hand, the principle that the Mareva doctrine was not intended to rewrite the English law of insolvency: (per Goff, J. in the *Angel Bell* [1980] 1 All ER 480 487 [1981] 1 QB 65 [1979] 2 Lloyd's Rep 491 and per Ackner, L.J. in *Bekhor & Co Ltd v. Bilton* [1981] 2 All ER 565) that *to achieve this end the Mareva injunction does not prevent a defendant from meeting his legitimate business debts out of the injuncted fund (The Angel Bell)* (*supra*) and, on the other hand, that propounded by Lord Denning in the *Third Chandris* (*supra*) p. 688 at p. 672, namely, *whether or not "there was likely to be any real risk of default on the part of the defendant"* and by Lord Justice Bridge in *Montecchi v. Shinco* [1979] 1 WLR 1180 1183 - 1184 [1980] 1 Lloyd's Rep 50, namely, that *an injunction would be granted if there was "A real reason to apprehend that if the injunction is not made the intending plaintiff … may be deprived of a remedy … "*

There appears to be a difference of judicial opinion as to whether it is necessary for a plaintiff in a Mareva application to establish that the defendant will deal with his assets with the intention and not just with the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to recover against the defendant. The following extracts from various judgments will illustrate this: …

Because in many case, there will be a practical difficulty of proving the requisite intent, I prefer the view that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant. I am fortified in this view by the following short dictum in the judgment of Raja Azlan Shah C.J. (Malaya) Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260, 264:

> *In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim.*

(emphasis added); and

(e) the following has been decided in *Jasa Keramat Sdn Bhd*, at p. 42 (CLJ); p. 229 (MLJ):

> The test to be applied by the court when deciding to exercise its discretion to grant a *Mareva* injunction to a plaintiff … is *whether, after the plaintiff has shown that he has a good and arguable case and after considering the whole of the evidence before the court, the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction (Ninemia). Are there facts from which the court, considering the matter in perspective as a prudent sensible man, can properly infer a danger that the defendant will deal with his assets such that he would have no assets within the jurisdiction to satisfy any judgment debt? (Third Chandris Shipping Corporation & Ors v. Unimarine SA* [1979] 2 All ER 972 at 987b, quoted in *Chai Chup Sengat* p. 854). *In that regard, the conduct and therefore probity of the defendant is eminently relevant (Ninemia; S & F International; Ang Chee Huat v. Engelbach Thomas Joseph* [1995] 2 MLJ 83 at 88; *Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261, *Amixo Asia Pte Ltd v. Bank Negara Indonesia* 1946 [1992] 1 SLR 703).
>
> (emphasis added).

[68] The following evidence shows lack of honesty on the part of the defendant:

(a) the defendant's admission as well as TMS's payment to defendant clearly showed that the vessel's DPS did not malfunction and the vessel had been successfully hired by the defendant to TMS;

(b) the defendant's email dated 21 August 2014 prevaricated (by falsely alleging that the defendant could not pay the second instalment because the plaintiff's documentation was "incomplete" and the defendant had already informed the plaintiff of such a matter) when the plaintiff pressed the defendant for payment of the second instalment by way of the plaintiff's email dated 21 August 2014; and

(c) the defendant dishonestly claimed at the meeting, the defendant's letters dated 11 September 2014 and 30 October 2014 that the vessel's DPS was not working properly.

The defendant's above dishonest conduct shows that:

(i) the defendant's probity cannot be relied on as explained in *S & F International Ltd* and *Ang Chee Huat*;

(ii) there is real risk or danger that if the plaintiff obtains a favourable arbitral award, such an award will remain unsatisfied because of the defendant's dissipation of assets within this jurisdiction as elaborated in *S & F International Ltd*, *Creative Furnishing Sdn Bhd* and *Ang Chee Huat*;

(iii) there is a real risk or danger that the defendant will dispose of its assets which has the effect of frustrating the plaintiff from recovering the fruits of any arbitral award as explained in *Pacific Centre Sdn Bhd*. As decided in *Pacific Centre Sdn Bhd*, there is no need for the plaintiff to show that the defendant has the intention to dissipate its assets so as to frustrate the plaintiff from enjoying the fruits of any favourable arbitral award; and/or

(iv) as held in *Jasa Keramat Sdn Bhd*, there is sufficient evidence in this case for a "prudent sensible man to infer a danger that the defendant will deal with its assets in such a manner that the defendant will have no assets within this jurisdiction to satisfy any" arbitral award which may be given in the plaintiff's favour.

[69] I reject the defendant's contention that the defendant's three disclosure affidavits has demonstrated the defendant's intention not to dissipate its assets. This decision is premised on the following grounds:

(a) as explained in the above para. 68, there is evidence to show the defendant's lack of honesty in this case; and

(b) the defendant's three disclosure affidavits have been filed in court and served on the plaintiff so as to comply with the mandatory disclosure order. If otherwise, the defendant would have been cited for contempt of court for non-compliance with the mandatory disclosure order.

Where Does Balance Of Convenience Lie?

[70] It was decided in *Lien Hoe Sawmill Co Sdn Bhd*, at p. 734, as follows:

> Having considered the three ingredients, it is necessary to consider the balance of convenience in this case. *It is said that the balance of convenience is an important factor in applications for Mareva. The Court's approach, however is different from that of ordinary interlocutory injunction. In the case of a Mareva the Court does not consider whether damages would be an adequate remedy. The Court considers the balance of convenience by weighing all matters against the harm Mareva injunction is likely to cause to the defendant*. See David Capper, *Mareva* Injunctions 1988 p. 50. The question of balance of convenience was considered in *Felixstowe Dock And Railway Co. v US. Lines Inc.* [1987] 2 Lloyd's Report 76, and in *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia* [1977] 3 All ER 324. In *Ninemia Maritime Corp v. Trave Schiffahrts - gesellschaft MBH & Co KG.* [1984] 1 All ER 398, Mustill J, as he then was, in his judgment at p. 422 said: ... *The ultimate test for the exercise of the jurisdiction is whether in all the circumstances, the case is one in which it appears to the Court 'to be just and*

A *convenient' to grant the injunction ... Further, it must always be remembered that if, or to the extent that, the Mareva injunction inflicts hardship on the defendant, his legitimate interests must prevail over those of the plaintiff.*

(emphasis added).

B **[71]** Based on *Lien Hoe Sawmill Co Sdn Bhd*, in considering where the balance of convenience lie in this case, the question of whether damages is an adequate remedy for the plaintiff, may not be so pertinent as compared to the issue of whether it is just and convenient, considering all the circumstances, to grant the *Mareva* injunction.

C **[72]** I am of the considered view that the balance of convenience lies in favour of a *Mareva* injunction in this case. This decision is based on the following reasons:

(a) if a *Mareva* injunction is not granted in this case, in view of the defendant's dishonesty as elaborated in the above para. 68, the frozen
D sum may be dissipated by the defendant before the plaintiff is able to obtain and enforce a favourable arbitral award. In other words, there will be irreparable harm to the plaintiff if this court refuses to grant a *Mareva* injunction in this case;

(b) there is no compelling evidence to show that if a *Mareva* injunction is
E given in this case, the defendant will be put out of business. The defendant has only exhibited its expenditure in January 2015 amounting to RM610,115.70 and such a sum has included DJSB's claim of RM510,000. There is no credible evidence supported by contemporaneous documents to show the actual monthly expense of the
F defendant. The mere fact that the defendant has an active on-going business which will be adversely affected by a *Mareva* injunction, is not sufficient in itself to tilt the balance of convenience against the award of such an injunction;

(c) if a *Mareva* injunction is given in this case and if the defendant succeeds
G in the arbitral proceedings:

(i) the defendant may enforce the plaintiff's undertaking to pay damages for all loss or damage suffered by the defendant which arises from the interim *Mareva* injunction pending the disposal of arbitral proceedings (plaintiff's undertaking). The plaintiff's undertaking
H may also be enforced in respect of any loss or damage which may have been caused to the defendant in respect of the defendant's dealing with DJSB; and

(ii) there is no evidence to show that the plaintiff is commercially
I insolvent and cannot honour the plaintiff's undertaking if arbitral proceedings is subsequently decided in the defendant's favour;

(d) to ensure that the *Mareva* injunction does not cripple the defendant's business, this court will make allowance for the defendant's reasonable and ordinary operating expense (which will be discussed later in this judgment). Allowance will also be made for the defendant to be able to pay for legal advice and representation in this case and the arbitral proceedings (please see below); and

(e) if a *Mareva* injunction is given and its continuance causes hardship to the defendant:

(i) the defendant has the liberty to apply to the court to vary or discharge the *Mareva* injunction. In *Lien Hoe Sawmill Co Sdn Bhd*, at p. 734, it was held as follows:

> Assuming that after the continuance of the *Mareva* injunction they suffer great hardship as a result of the injunction, they are at liberty to apply to this Court to vary the *Mareva* injunction to alleviate the hardship.; and/or

(ii) this court will make an order that the court's interim *Mareva* injunction may be varied subsequently by the arbitral tribunal (please see below).

Limit Of Monetary Claim Has Been Specified In Mareva Injunction In This Case

[73] A *Mareva* injunction must contain the sum for which the plaintiff claims to have a "good arguable case". This is clear from the following cases:

(a) Abdoolcader FJ decided as follows in *S & F International Ltd*, at p. 285 (CLJ); p. 66 (MLJ):

> *In the event at the conclusion of argument we allowed the appeal with costs and varied the order of January 26, 1984 made by the learned Judge by the insertion of the words 'to the extent of $2,025,822.40' in respect of the moneys held to the account of the appellant by the [National Electricity Board] under the main contracts.*
>
> (emphasis added); and

(b) in *Motor Sports International Ltd*, at p. 491 (CLJ); pp. 611-612, Gopal Sri Ram JCA delivered the following judgment of the Court of Appeal:

> Second, counsel for the appellants has drawn our attention to the fact that *the ex parte order did not place a monetary limit on the sums frozen in the bank accounts.*
>
> Now, *it is a well established principle governing Mareva injunctions that they ought not to place a restraint upon a defendant more than is absolutely necessary* (see *Searose Ltd v. Seatrain UK Ltd* [1981] 1 WLR 894 at p. 897, per Robert Goff J). In a case such as the present, *where the amount of the claim has been quantified, it is necessary for the order of court*

to sufficiently identify the upper limit of the sum that is sought to be protected by the injunction. As Lord Denning observed in *Z Ltd v. A-Z & AA-LL* [1982] 1 QB 558 at 576:

> In other cases, however, it may still be desirable to insert a maximum amount in the general injunction as against the defendant himself. But, as this is unworkable against a bank, it would at the same time be desirable to add a special injunction restraining the defendant from disposing of any of the sums standing to the credit of the defendant in a specified bank account in excess of the maximum: or from disposing of any item deposited with the specified bank for safe custody. The reason being that every bank or other innocent third party should know exactly what it should or should not do.

Also see, *Iraqi Ministry of Defence & Ors v. Arcepey Shipping Co SA & Anor* [1981] QB 65.

In our judgment, where a plaintiff claims an exact sum, a Mareva injunction that restrains the defendant from dissipating his assets must specify an upper limit; if it does not, then the order is liable to be condemned as being too wide and therefore oppressive. The remedy of a Mareva is, after all, equitable relief that is granted to ensure that the course of justice is not thwarted. Since equitable considerations are involved, a court should carefully weigh the balance of justice to ensure that any order it makes or any relief it grants in the exercise of its Mareva jurisdiction is not used as an instrument of oppression.

(emphasis added).

[74] In this case, the first prayer has clearly specified the claimed sum as the monetary limit for the *Mareva* injunction.

Plaintiff's Delay Does Not Bar Mareva Injunction From Being Granted In This Case

[75] The *ex parte* order was granted on 21 January 2015 and the plaintiff gave the arbitration notice on 11 February 2015. The plaintiff's delay was thus only 23 days. As such, the plaintiff's delay was not so excessive so as to:

(a) evidence *mala fide* on the plaintiff's part;

(b) constitute an abuse of court process;

(c) prejudice and/or oppress the defendant by prolonging the hearing of court encl. no. 5 and OS; and

(d) bar the plaintiff from applying for an *inter partes Mareva* injunction in this case.

[76] Even though the plaintiff's delay may not constitute a sufficient reason to dismiss court encl. no. 5 and OS, the plaintiff's delay is clearly relevant to the question of costs in this case (which will be discussed later in this judgment).

[77] If there is any delay on the plaintiff's part in conducting the arbitral proceedings, the defendant is at liberty to apply to:

(a) court to vary or set aside the *Mareva* injunction; and/or

(b) the arbitral tribunal to vary the *Mareva* injunction

(please see the above sub-para. 47(c)).

Ex Parte Order Should Be Given In This Case

[78] This court granted the *ex parte* order as the following matters have been satisfied by the plaintiff:

(a) the plaintiff has a "good arguable case" in respect of the defendant's breach;

(b) the defendant has assets within this jurisdiction;

(c) there is a risk that the defendant may dissipate its assets; and

(d) the balance of convenience is in favour of granting the *ex parte Mareva* injunction.

[79] In *Creative Furnishing Sdn Bhd*, at p. 25 (CLJ); p. 155 (MLJ), it was held as follows:

> *Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the ex parte application would invariably be fatal*. On this particular point we approve the judgment of VC George J in *KSM Credit & Leasing Sdn Bhd v. Data Mante (M) Sdn Bhd & Ors* [1986] 1 CLJ 500 on the applicability of the principle of frank and full disclosures in all *ex parte* applications for *Mareva* injunctions.
>
> *It is of utmost importance that the remedy of a Mareva injunction should not be abused*. The caution for the benefit of the solicitors for the City of London given by Lord Denning MR in *Third Chandris Shipping Corporation & Ors v. Unimarine SA* [1979] 2 All ER 972 (at p 985) had been quoted with approval in *Aspatra*'s case at p 104, and we wish, with respect, to adopt the same caution for the benefit of the solicitors in this country.
>
> (emphasis added).

[80] I am satisfied that the plaintiff has not:

(a) concealed any material fact in applying for and obtaining the *ex parte* order; and

(b) misrepresented or misled in any material manner the facts in support of court encl. no. 5.

Allowance For Reasonable And Ordinary Operational Expense And Legal Fees

[81] When the court grants a *Mareva* injunction, the court should ensure that the *Mareva* injunction is not abused so as to oppress the defendant - *Motor Sports International Ltd*, at p. 612. As such, the court in giving a *Mareva* injunction, should consider allowing the defendant to use its frozen assets for any one or more of the following three purposes:

(a) if the defendant is an individual, the defendant may apply for access to his or her frozen assets to pay reasonable and ordinary living expense. I rely on the following cases:

(i) Clarke LJ (as his Lordship then was) in the English Court of Appeal case of *Halifax Plc v. Chandler* [2001] EWCA Civ 1750, at paras. 16-20, stated as follows:

> [16] *It is well settled that a freezing injunction is not granted in order to provide the claimant with security for its claim. It is, at least in part, for that reason that the standard form of order permits the defendant to spend monies on legal expenses and indeed on ordinary and proper business expenses. The order ordinarily either includes a specific weekly sum for legal or business expenses or permits a reasonable sum for such expenses.*
>
> [17] These principles are not in dispute. Three examples may be given. (1) A defendant is entitled to pay his debts as they fall due even if the creditor could not recover them at law, as, for example, because of the provisions of the Moneylenders Act (see the decision of Robert Goff J in *Iraqi Ministry of Defence and Others v. Arcepey Shipping Co SA*, *The Angel Bell* [1981] 1 QB 65, [1980] 1 All ER 480 which has frequently been followed in the 20 years or so since it was decided). (2) A distinction is drawn between cases where the claimant has a proprietary claim and cases where he does not. Sir Thomas Bingham MR put the distinction in this way in *Sundt Wrigley Co Ltd v. Wrigley* (unreported, 23 June 1993):
>
> > *In the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence*. In the proprietary case, however, the judgment is a more difficult one because in the plaintiff's contention the money on which the defendant wishes to rely to finance his litigation is not the defendant's money at all but represents money which is held on trust for the

> plaintiff. That, of course, gives rise to an obvious risk of injustice if the plaintiff, successful at the end of the day, finds that his own money has been used to finance an unsuccessful defence. As these authorities make plain, a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence.

(3) As that passage shows, in the *Mareva* case, *in order to be allowed to spend frozen monies, the defendant must show that he has no other assets which he can use*.

[18] *In cases of what may be called ordinary business expenses the court does not usually consider whether the business venture is reasonable, or indeed whether particular business expenses are reasonable. Nor does it balance the defendant's case that he should be permitted to spend such monies against the strength of the claimant's case, or indeed take into consideration the fact that any monies spent by the defendants will not be available to the claimant if it obtains judgment. As I see it, that is because the purpose of a freezing injunction is not to interfere with the defendant's ordinary business or his ordinary way of life.*

[19] In the fourth edition of *Mareva* Injunctions and *Anton Pillar* Relief, Gee says at page 318:

> *The court will always be concerned to ensure that a Mareva injunction does not operate oppressively and that a defendant will not be hampered in his ordinary business dealings any more than is absolutely necessary to protect the plaintiff from the risk of improper dissipation of assets. Since the plaintiff is not in the position of a secured creditor, and has no proprietary claim to the assets subject to the injunction, there can be no objection in principle to the defendant's dealing in the ordinary way with his business and with his other creditors, even if the effect of such dealings is to render the injunction of no practical value.*

[20] *In my judgment, the relevant principles are correctly stated in that passage*.

(emphasis added); and

(ii) in *PCW (Underwriting Agencies) Ltd*, at p. 164 and 165, Lloyd J in the English High Court held as follows:

> It is difficult to regard the whole of a man's assets as a fund in that sense, even though his assets may in part contain or be derived from money improperly come by. But even if I

> could regard the whole of the defendant's assets as a trust fund, I would be quite unwilling to uphold the *ex parte* order in the present case on that basis. *All injunctions are, or course, in the end discretionary. I would regard it as unjust in the present case if the defendant were compelled to reduce his standard of living, to give up his flat or to take his children away from school, in order to secure what is as yet only a claim by the plaintiffs. I would regard it as even more unjust that he should be prevented from defending himself properly (for that is what it would amount to), merely because the plaintiffs say that in doing so he is using somebody else's money*. …
>
> *In my view justice and convenience require in the present case that the first defendant should be allowed the means of defending himself, even if it could be said that the plaintiffs had laid claim to the whole of his assets as a trust fund. Similarly justice and convenience require that he should be able to pay his ordinary bills and continue to live as he has been accustomed to live heretofore. So whether the case is put on the basis of the Mareva jurisdiction or the so-called wider jurisdiction to trace in equity I reach the same conclusion.*
>
> (emphasis added).

Based on the above cases, if a defendant has no other unfrozen assets, the court should allow the defendant subject to a *Mareva* injunction to use the frozen funds for the defendant's reasonable and ordinary living expense.

On a different note, s. 44(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) allows the appropriate law enforcement agency to freeze assets in respect of money-laundering and terrorism financing offences. When a freezing order has been made under s. 44(1) AMLATFA, the appropriate law enforcement agency may give "directions" under s. 44(3)(b)(iii) AMLATFA for the disposal of the frozen assets for the purpose of, among others, "the payment of money to that person for the reasonable subsistence of that person and his family";

(b) as decided in *Halifax Plc* and *PCW (Underwriting Agencies) Ltd*, the court should allow a party subject to a *Mareva* injunction, to use the frozen assets for the party's reasonable and ordinary operational expense if the party has no other assets except for the frozen assets; and

(c) based on *Halifax Plc* and *PCW (Underwriting Agencies) Ltd*, the court should also make provision in a *Mareva* injunction for the defendant to utilise the frozen funds to pay for his or her legal advice and representation in the suit and arbitration in question. I also rely on *Cantor Index Ltd v. Lister* [2002] CP Rep 25, where Neuberger J (as his Lordship then was) in the English High Court decided as follows:

The first is whether the defendant can invoke paragraph 3(1) of the Freezing Order to pay solicitors for work already done. In my view, the answer to that is in the affirmative. I do not see why, as a matter of principle, lawyers who are prepared to act and advise the defendant without being paid up front, should be precluded from being paid for the work they have done simply because they choose to ask for it after they have done the work, or while they are doing the work. …

The claim for solicitors' costs presents greater difficulties. There is nothing in the Freezing Order which prevents me ordering payment. Indeed, the defendant is entitled to require a payment, but I do not see why I should allow anything like the £57,000, without being satisfied that such a sum really is justified.

(emphasis added).

Based on *Cantor Index Ltd*, the plaintiff:

(i) cannot deny a defendant's access to funds injunct by a *Mareva* injunction, for the purpose of the defendant's legal advice and representation; and

(ii) is entitled to challenge the quantum of legal costs sought to be used by the defendant.

Section 44(3)(b)(v) AMLATFA allows the appropriate law enforcement agency to give "directions" for the disposal of the frozen assets for the purpose of, among others, "the payment of the costs of that person to defend criminal proceedings against him".

[82] In this case:

(a) the plaintiff allowed the defendant to have access to RM10,000 a week for the defendant's operational expense. The plaintiff was willing to agree to RM50,000 as legal costs for the defendant; and

(b) the defendant applied for RM50,000 a week for its operational cost and sought RM250,000 to pay its lawyers for this case and the arbitral proceedings.

[83] I award RM30,000 a week for the defendant to use as reasonable and ordinary operational expense (defendant's monthly operating expense) because the defendant is in the "Oil and Gas" industry which requires a huge operating budget.

[84] Ms Lavinia Kumaraendran contended that the frozen sum only amounted to RM1,559,470.06 and if a high sum of the defendant's monthly operating expense is allowed by this court, there will be nothing left for the plaintiff if arbitral proceedings are decided in the plaintiff's favour. Regrettably, I am not able to accede to this submission for the following reasons:

(a) the plaintiff may request the defendant to substantiate the defendant's monthly operating expense with the relevant supporting documents and if the defendant's actual monthly operational cost is less than that allowed by court, the plaintiff is entitled to apply to court or the arbitral tribunal to lower the amount of the defendant's monthly operating expense; and

(b) it is in the interest of both parties for arbitral proceedings to be concluded expeditiously.

[85] A sum of RM80,000 for the defendant's legal costs for both this case and the arbitral proceedings is reasonable and not excessive because:

(a) the disposal of court encl. no. 5 and OS has been conducted on an urgent basis; and

(b) the plaintiff's claim in this case totalled RM4,145,829.60.

Plaintiff's Delay Is Relevant To Question Of Costs

[86] The plaintiff's delay indicates a complacent, if not a lackadaisical, attitude on the plaintiff's part after the plaintiff has obtained the *ex parte* order. After obtaining the *ex parte* order, the plaintiff should have sent the arbitration notice as soon as reasonably possible. The plaintiff's delay is relevant to the question of costs under O. 59 r. 8(b) RC which reads as follows:

Special matters to be taken into account in exercising discretion

Order 59 rule 8 *The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account –*

(a) …;

(b) **the conduct of all the parties, including conduct** before and **during the proceedings**; …"

(emphasis added)

[87] In *Dawama Sdn Bhd v. Mohd Fadel Yusof & Ors* [2014] 1 LNS 803; [2015] 7 MLJ 1, at para. 25:

(a) I disallowed an application by a company's employees to intervene in an originating summons (filed by the company to restructure the company under s. 176 of the Companies Act 1965); and

(b) despite dismissing the intervention application, I ordered costs of the intervention application to be borne solely by the company under O. 59 r. 8(b) RC because of the company's unbecoming conduct in not paying the salaries of its employees.

[88] In view of the plaintiff's delay, I exercise my discretion under O. 59 r. 8(b) RC and make no order as to costs for both court encl. no. 5 and OS.

Court's Decision

[89] Based on the above reasons, this court makes the following order for court encl. no. 5 and OS (this order):

(a) the first and fourth prayers are granted pending the disposal of arbitral proceedings in KLRCA;

(b) the defendant is allowed to use RM30,000 a week from the frozen sum as its operational expense;

(c) the defendant is given access to the frozen sum amounting to RM80,000 for its legal costs;

(d) both parties have liberty to apply to the arbitral tribunal to vary this order; and

(e) no order for costs in respect of both court encl. no. 5 and OS.

Arbitral Tribunal's Functions

[90] To ensure that the arbitral tribunal has unfettered power to decide this dispute as intended by the parties in the arbitration clause and in conformity with the "minimalist" approach embodied in s. 8 AA, this court states the following:

(a) no finding of fact and/or law has been made by this court in court encl. no. 5 and OS as regards the merits of this dispute. The arbitral tribunal is free and is indeed duty bound to decide solely the merits of this dispute. The arbitral tribunal should not be influenced in any manner by this judgment. By analogy to interlocutory injunction cases pending disposal of suits, I cite Gopal Sri Ram JCA's (as his Lordship then was) judgment in the Court of Appeal case of *Hock Hua Bank (Sabah) Berhad*, at p. 904 (CLJ); p. 220 (MLJ), as follows:

> In my judgment, a judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level. Translated to a case such as the present, a judge may grant an interlocutory injunction because he finds a particular line of defence taken to be untenable and yet, after hearing all the evidence and detailed argument at the trial, reach the opposite conclusion and dismiss the suit. I cannot help but think that such an occurrence is commonplace in our courts as it is indeed in other jurisdictions.;

A (b) pending the disposal of arbitration, the parties may apply to the arbitral tribunal to vary this order as expressly allowed by this order. Both parties are, of course, entitled to apply to this court to vary or discharge this order; and

B (c) if the arbitral tribunal dismisses the plaintiff's claim at the end of the arbitral proceedings, the arbitral tribunal is empowered to enforce the plaintiff's undertaking and assess all loss and damage suffered by the defendant as a result of the *Mareva* injunction granted in this order.

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